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No. 90-281

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

ASSOCIATED GROCERS, INC.,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Does this Court have certiorari jurisdiction under 28 U.S.C. § 1257 to determine whether the Washington Supreme Court "deprived [petitioner] of its rights under the Due Process Clause of the Fourteenth Amendment," where petitioner failed to properly raise this procedural due process issue at any point during the proceedings below and where the Washington Supreme Court did not address this due process issue?

II. Does this Court have certiorari jurisdiction under 28 U.S.C. § 1257 to determine whether the Due Process Clause of the Fourteenth Amendment mandates some form of retrospective relief to petitioner, where the Washington Supreme Court concluded that its equal protection holding should apply prospectively only as to all taxpayers (including petitioner) and where petitioner has presented no substantial federal question relating to the Washington court's prospective application of its equal protection holding?

III. Should the portion of the judgment below that denied petitioner any form of retrospective relief be deemed correct because the Washington Supreme Court erroneously concluded that the partial tax exemption in question violated the Equal Protection Clause of the Fourteenth Amendment?

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ASSOCIATED GROCERS, INC.,

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THE STATE OF WASHINGTON,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Respondent concurs in petitioner's statement of the grounds on which the jurisdiction of this Court is invoked, except that respondent believes this Court may lack jurisdiction to review the Washington Supreme Court's judgment by writ of certiorari under 28 U.S.C. § 1257 for the reasons presented herein.

STATEMENT OF THE CASE

Washington imposes business and occupation (B&O) tax on the activities of making wholesale or retail sales. Wash. Rev. Code §§ 82.04.270(1), 82.04.250. A wholesale sale is a sale for resale either to another wholesaler or to a retailer. Wash. Rev. Code 82.04.060. A retail sale is a sale to a consumer, i.e., a sale not for resale. Wash. Rev. Code § 82.04.050.

Both wholesale and retail B&O taxes are measured by the gross proceeds of sales. The basic rate of both taxes is .0044. Wash. Rev. Code §§ 82.04.270(1), 82.04.250. Thus, the wholesale B&O tax on a sale of $1,000 is $4.40. The retail B&O tax on a sale of $1,000 also is $4.40.

At various times, including the present, Washington has imposed an additional B&O tax on internal distributions by retailers with two or more retail outlets. Wash. Rev. Code § 82.04.270(2). An internal distribution is not a sale. It occurs when a retail business distributes merchandise from its own warehouse to one of its retail outlets. The measure of this additional tax is the value of the articles distributed. The basic rate is .0044. *Id.* Thus, if a retailer distributes goods valued at $1,000 from its warehouse to its retail outlet, the additional internal distribution tax is $4.40. This tax is imposed in addition to the retail B&O tax paid by the same business when it sells the goods to a consumer.

Washington relieves the retailer of the additional B&O tax on internal distributions if the retailer purchases the goods from a wholesaler that has paid the wholesale B&O tax on the same goods. Wash. Rev. Code § 82.04.270(2). However, this partial exemption does not apply to the tax imposed on the retail sale of the goods. The retailer is always subject to the retail B&O tax.

Wholesalers are not subject to the B&O tax on internal distributions. Thus, they cannot claim the partial exemption that relieves the additional tax on some internal distributions. Just as the retailer is subject to the retail B&O tax on all sales, the wholesaler is subject to the wholesale B&O tax on all sales.

The pertinent provisions of Wash. Rev. Code § 82.04.270 have not changed in substance since 1959, when the Washington Legislature added the partial exemption to subsection (2). From 1959 until the end of 1985, petitioner Associated Grocers voluntarily paid wholesale B&O taxes under the statute on all sales without protest. During this period, neither Associated Grocers nor any other wholesaler

challenged the constitutionality of the partial exemption for certain internal distributions.

On December 31, 1985, Associated Grocers filed this action for a partial refund of wholesale B&O taxes paid since January 1, 1981. Associated Grocers alleged that it was entitled to this refund because the partial exemption in Wash. Rev. Code § 82.04.270(2) for internal distributions is unconstitutionally discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment and the equivalent provision of the Washington State Constitution.

On August 12, 1987, Associated Grocers brought a motion for summary judgment in this action. The State of Washington brought a cross-motion for summary judgment. The trial court entered a partial summary judgment for Associated Grocers on March 29, 1988. The trial court concluded that the partial exemption in Wash. Rev. Code § 82.04.270(2) violates the equal protection provisions of the federal and state constitutions. The trial court further concluded that the remedy most consistent with legislative intent was to extend the partial exemption to wholesalers like Associated Grocers rather than to declare the partial exemption void (Pet. 27a-28a). On October 11, 1988, consistent with those conclusions, the trial court entered a refund judgment for Associated Grocers in the amount of $9,938,529 plus interest (Pet. 34a-35a).[1]

On appeal, the Washington Supreme Court affirmed in part and reversed in part the trial court's judgment. The Washington Supreme Court agreed with the trial court that the partial exemption is unconstitutional because "all members of a designated class must be treated equally under the statute." *Associated Grocers, Inc. v. State*, 114 Wash. 2d 182, 184, 787 P.2d 22, 23 (1990) (Pet. 2a). The Washington Supreme Court held, however, that the trial court's retrospective extension of the partial exemption to wholesalers was

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[1] Associated Grocers inaccurately states that the trial court "extended the partial exemption prospectively to Associated Grocers" (Pet. 6). The trial court's judgment granted no prospective relief to Associated Grocers (Pet. 32a-35a).

an inappropriate remedy. The supreme court held that the appropriate remedy under state law was to strike the unconstitutional exemption and, therefore, the court reversed the refund the trial court had granted to Associated Grocers. *Associated Grocers*, 114 Wash. 2d at 184, 189-90, 787 P.2d at 23, 26-27 (Pet. 2a, 7a-9a).[2]

After holding that Associated Grocers was not entitled under state law to a refund of taxes paid pursuant to Wash. Rev. Code § 82.04.270(1), the Washington Supreme Court addressed whether its decision in this case should be applied prospectively only. The court recognized that if its equal protection holding applied retrospectively, retailers who had received the benefits of an invalid partial exemption for 30 years arguably "should now be assessed for taxes they should have paid" as a matter of state law. *Associated Grocers*, 114 Wash. 2d at 190, 787 P.2d at 27 (Pet. 9a).[3] Because "all parties presumed the validity of RCW 82.04.270(2), and great financial and administrative hardship would result from retroactive application of [its] decision in this case", the court applied its holding prospectively only. 114 Wash. 2d at 190-91, 787 P.2d at 27 (Pet. 9a). The court struck the partial exemption from Wash. Rev. Code § 82.04.270(2) effective April 1, 1990, thirty days after the

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[2]Associated Grocers inaccurately states that the supreme court "disregarded" Wash. Rev. Code § 82.32.060, which provides for a refund of a tax paid "in excess of that properly due" (Pet. 7 n.6). The court specifically addressed whether this statute entitled Associated Grocers to a refund. The court held that Associated Grocers had paid no wholesale B&O taxes "in excess of that properly due" because the wholesale tax imposed by Wash. Rev. Code § 82.04.270(1) is not unconstitutional and because the appropriate remedy under state law is to strike rather than to extend the partial exemption in Wash. Rev. Code § 82.04.270(2) that the court concluded is unconstitutional. Whether Wash. Rev. Code § 82.32.060 mandates a refund in such circumstances is strictly a question of state law. "[I]t is not our function to construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974).

[3]Associated Grocers states that the court "noted the argument" that retailers should be assessed retroactively for unpaid taxes (Pet. 7). This Court should be aware that neither before nor after the Washington Supreme Court's decision did Associated Grocers ever seek such a remedy from the courts below. Instead, Associated Grocers consistently argued that a refund and other monetary relief to *it* was the *only* appropriate remedy in this case.

court's decision. 114 Wash. 2d at 191, 787 P.2d at 27 (Pet. 9a).

Both parties filed timely motions for reconsideration in the Washington Supreme Court. The State of Washington's reconsideration motion argued that the court's equal protection holding was inconsistent with controlling United States Supreme Court precedents and with the Washington court's own precedents. The State urged the court to uphold the constitutionality of the partial exemption. Associated Grocers' reconsideration motion was limited to whether it should receive a partial exemption from wholesale B&O taxes for the period from January 1, 1981, through March 31, 1990.[4]

Most of Associated Grocers' reconsideration motion was devoted to its contentions that prospectively severing the partial exemption was "an incomplete and therefore inappropriate remedy" as a matter of state law and that the court's denial of a tax refund to Associated Grocers was inconsistent with the goal of fashioning appropriate equitable relief recognized by the court in *Bond v. Burrows*, 103 Wash. 2d 153, 690 P.2d 1168 (1984) (App. 4a-10a).

Associated Grocers also argued briefly that federal constitutional law mandates that it receive retrospective monetary relief.[5] Contrary to the representation in Associated Grocers' petition, however, this was *not* a *due process*

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[4]Associated Grocers specifically disclaimed any request that the court reconsider its decision to sever the partial exemption prospectively for the period after March 31, 1990 (App. 2a).

[5]Rule 14.1(h) requires the statement of the case in a petition for a writ of certiorari to specify the stage in the proceedings at which the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed upon by the state courts, and such pertinent quotation of specific portions of the record or summary thereof (with specific reference to the places in the record where the matter appears) as will show that the federal question was timely and properly raised. Associated Grocers' statement of the case fails to comply with this rule because Associated Grocers cannot quote any portion of the record to show that the federal question presented in its petition was timely and properly raised in the state courts. Respondent has reproduced as an Appendix the motion for reconsideration filed by Associated Grocers in the Washington Supreme Court to assist this Court in determining whether it has jurisdiction to review the state court's judgment on a writ of certiorari.

argument. Instead, Associated Grocers contended that the Washington Supreme Court's decision violates its rights under the *Equal Protection Clause* of the Fourteenth Amendment.[6]

ARGUMENT

I. THIS COURT PROBABLY LACKS JURISDICTION TO REVIEW THE WASHINGTON SUPREME COURT'S JUDGMENT BECAUSE ASSOCIATED GROCERS FAILED TO PROPERLY RAISE AT ANY POINT IN THE PROCEEDINGS BELOW THE PROCEDURAL DUE PROCESS ISSUE PRESENTED IN ITS PETITION FOR WRIT OF CERTIORARI AND THE WASHINGTON SUPREME COURT DID NOT ADDRESS THIS DUE PROCESS ISSUE.

For the first time on appeal to this court, and in an attempt to equate this case with *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990), Associated Grocers now urges that the Due Process Clause requires that it be afforded "meaningful retrospective relief" in this case. (Pet. 8-9, 12, 14).

The trial court granted Associated Grocers retrospective relief in the form of a refund "pursuant to RCW 82.32.060" because, in the trial court's view, "the remedy most consistent with the legislative purpose of RCW 82.04.270 is to extend the exemption to wholesalers." (Pet. 27a, 34a). Thus, the trial court rested its remedial holding exclusively on state law. The trial court did not consider or

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[6]Associated Grocers accurately states that it cited *Carpenter v. Shaw*, 280 U.S. 363 (1930), *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928), and *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), in its reconsideration motion to the Washington Supreme Court and that this Court later relied on these cases in support of its procedural due process holding in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990). Associated Grocers cited these three cases, however, only in support of its contention that "to deny [it] relief during the interim period and the refund ordered by the trial court would be to deny [it] equal protection under federal constitutional law." (App. 10a). Associated Grocers' reconsideration motion contains not a single reference to "due process." (App. 1a-12a).

determine the due process issue now raised by Associated Grocers because no such argument was presented to it.

The Washington Supreme Court concluded that the trial court erred in granting retrospective relief to Associated Grocers. Like the trial court, however, the supreme court based this remedial holding exclusively on state law. The supreme court held that the appropriate remedy under state law was to sever the exemption rather than to extend it to wholesalers. *Associated Grocers*, 114 Wash. 2d at 184, 189-90, 787 P.2d at 23, 26-27 (Pet. 2a, 7a-9a). The supreme court's opinion did not pass on the due process issue now raised by Associated Grocers.[7] Again, this was because no such argument was presented to it.

The Washington Supreme Court's summary order denying motions for reconsideration similarly gives no indication that the court considered or determined this due process issue. (Pet. 36a). Neither party's motion for reconsideration presented this issue to the court. Associated Grocers did argue briefly in its motion that the supreme court's disposition of the case denied Associated Grocers "equal protection under federal constitutional law." (App. 10a). However, the reconsideration motion contained no due process argument.

Under 28 U.S.C. § 1257, final judgments rendered by the highest court of a state may be reviewed by the Court by writ of certiorari where a federal title, right, privilege, or immunity has been "specifically set up or claimed." Under the Court's interpretation of this statute, the Court generally will not review federal claims that were not "pressed or passed upon" in the state court. *Clark v. Jeter*, 486 U.S. 456, 459-60 (1988); *Bankers Life & Casualty Co. v. Crenshaw*,

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[7]The court began its discussion of prospectivity with the following statement: "Arguably distributors, who have benefited for 30 years from an invalid exemption, should now be assessed for taxes they should have paid." *Associated Grocers*, 114 Wash. 2d at 190, 787 P.2d at 27 (Pet. 9a). This was nothing more than the court's statement of the obvious effect under state law of applying the court's decision retrospectively. There is no indication in this sentence that the court considered or determined whether the Due Process Clause required it to grant some form of retrospective relief to Associated Grocers.

486 U.S. 71, 75-80 (1988); *Illinois v. Gates*, 462 U.S. 213, 217-24 (1983).

Therefore, the Court probably lacks jurisdiction to review the Washington Supreme Court's judgment because the only question presented in Associated Grocers' petition was neither properly raised nor decided below.

II. THIS COURT PROBABLY LACKS JURISDICTION TO REVIEW THE WASHINGTON SUPREME COURT'S JUDGMENT BECAUSE ASSOCIATED GROCERS' PETITION FOR CERTIORARI PRESENTS NO SUBSTANTIAL FEDERAL QUESTION RELATING TO THE WASHINGTON COURT'S PROSPECTIVE APPLICATION OF ITS UNDERLYING EQUAL PROTECTION HOLDING.

After holding that the partial exemption in Wash. Rev. Code § 82.04.270(2) is unconstitutional and after holding that the appropriate remedy under state law is to strike the unconstitutional exemption rather than extend it the Washington Supreme Court held that its entire decision would apply prospectively only. The court did this because "all parties presumed the validity of RCW 82.04.270(2), and great financial and administrative hardship would result from retroactive application of [the court's] decision in this case." *Associated Grocers,* 114 Wash. 2d at 190-91, 787 P.2d at 27 (Pet. 9a). The court applied its decision uniformly to all taxpayers (including Associated Grocers) effective April 1, 1990, thirty days after the court's decision. 114 Wash. 2d at 191, 787 P.2d at 27 (Pet. 9a).

The effect of the Washington Supreme Court's prospectivity holding is to declare that the partial exemption in Wash. Rev. Code 82.04.270(2) was constitutional and valid during all periods prior to April 1, 1990. *Cf. American Trucking Ass'ns, Inc. v. Smith*, 110 S. Ct. 2323, 2333 (1990) (under the third prong of the *Chevron Oil* test, "the question is not whether equitable considerations outweigh the obligation to provide relief for a constitutional violation, but

whether there is a constitutional violation in the first place"). Since the exemption statute was valid until April 1, 1990, neither state law nor federal law entitles Associated Grocers to any retrospective relief whatsoever. Unless this Court declares the Washington court's prospectivity holding in conflict with federal law, the judgment below precludes the State of Washington -- for all tax periods prior to April 1, 1990 -- from refunding wholesale B&O taxes to Associated Grocers or other wholesalers *and* from collecting additional B&O taxes from retailers on their internal distributions.

In arguing that the Due Process Clause requires that it "be afforded meaningful retrospective relief," Associated Grocers necessarily *assumes* that the Washington court's underlying equal protection holding applies retrospectively. The Washington court held directly to the contrary, however, and Associated Grocers' petition presents no satisfactory explanation why any controlling federal law prohibits the Washington court from so holding.[8]

Associated Grocers contends that this case, like *McKesson*, "does not involve any issue" as to whether the Washington Supreme Court's underlying equal protection decision should be applied prospectively or retrospectively because it "rested on well-established principles of Equal Protection Clause jurisprudence." (Pet. 9 n.7). To the contrary, this case bears no resemblance at all to *McKesson*.

Because this case does not involve the application of settled law, the due process reasoning in *McKesson* is inapplicable here. The issue before the Court in *McKesson* was whether Florida could give prospective relief only to a taxpayer that had paid taxes under a Florida statute enacted shortly *after* the Court's decision in *Bacchus Im-*

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[8]It is well-settled that neither the Due Process Clause nor the Equal Protection Clause prohibits the application of decisions prospectively only. *See American Trucking Ass'ns, Inc. v. Smith*, 110 S.Ct. 2323, 2342 (1990); *Solem v. Stumes*, 465 U.S. 638, 642 (1984); *United States v. Johnson*, 457 U.S. 537, 542 (1982); *Williams v. United States*, 401 U.S. 646, 651 (1971); *Linkletter v. Walker*, 381 U.S. 618, 629 (1965).

ports, Ltd. v. Dias, 468 U.S. 263 (1984), and where *Bacchus* clearly foreclosed any argument that the statute was constitutional. Because the Florida Supreme Court's decision invalidating the post-*Bacchus* statute involved "only the application of settled Commerce Clause precedent," the Court examined Florida's obligation to provide relief under the Due Process Clause. *American Trucking Ass'ns, Inc. v. Smith*, 110 S. Ct. 2323, 2332 (1990). The Court concluded that Florida had a constitutional duty to provide retrospective relief to McKesson because the taxes at issue were paid under a statute that violated settled constitutional law when enacted and enforced and because the taxes were paid under duress. In reaching this conclusion, the Court found that Florida could "hardly claim surprise at the Florida courts' invalidation" of the post-*Bacchus* statute because it was essentially identical to the Hawaii statute invalidated in *Bacchus*. *McKesson*, 110 S. Ct. at 2255; *see id.* at 2257 ("[T]he State here does not and cannot claim that the Florida courts' invalidation of the Liquor Tax was a surprise[.]").

In contrast, the Washington courts' underlying equal protection holdings in this case were completely unanticipated because they conflicted with settled constitutional law. As the three dissenting justices in *Associated Grocers* recognized, the Washington Supreme Court majority ignored controlling United States Supreme Court precedents and the Washington court's own precedents in declaring the partial exemption in Wash. Rev. Code § 82.04.270(2) unconstitutional. *Associated Grocers*, 114 Wash. 2d at 191-97, 787 P.2d at 27-30 (Dolliver, J., dissenting) (Pet. 10a-17a).[9] From

[9]The dissenting justices also recognized that the majority's citation of *Benjamin Franklin Thrift Stores, Inc. v. Henneford*, 187 Wash. 472, 60 P.23 86 (1936) and *Air-Mac, Inc. v. State*, 78 Wash. 2d 319, 474 P.2d 261 (1970) for the proposition that "[t]his court has consistently treated distributors and wholesalers as members of a single class under the statute and its forerunners" is an inacurrate reading of those cases and provides no support for the majority's equal protection holding. 114 Wash. 2d at 194, 787 P.2d at 29 (Dolliver, J., dissenting) (Pet. 13a-14a). In *Benjamin Franklin*, the court rejected an equal protection challenge to the

1959 (when the Legislature enacted the partial exemption) until the end of 1985 (when Associated Grocers filed this action), neither Associated Grocers nor any other wholesaler challenged the constitutionality of the partial exemption. Even the Washington Supreme Court majority acknowledged: "[A]ll parties presumed the validity of RCW 82.04.270(2), and great financial and administrative hardship would result from retroactive application of our decision in this case." *Associated Grocers*, 114 Wash. 2d at 190-91, 787 P.2d at 27 (Pet. 9a).

The Washington court applied its equal protection holding prospectively only precisely because the decision could not be anticipated by anyone.[10] In accordance with the Washington court's prospectivity holding, none of the taxes in question were collected under an unconstitutional statute. Under such circumstances, the *McKesson* due process analysis has no application.

The only question presented in Associated Grocers' petition for certiorari relating to the Washington court's prospective application of its equal protection holding is whether such prospective application violates the Due Process Clause. Because it has long been settled that the Due Process Clause "has no voice upon the subject" of prospective application, *Great Northern Ry. v. Sunburst Oil & Re-*

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differing tax treatment in the statute between owners of one retail store and owners of two or more retail stores. The court's holding in *Benjamin Franklin* contradicts rather than foreshadows its holding in *Associated Grocers*. The *Benjamin Franklin* court specifically disclaimed any intent to address the constitutionality of differing tax treatment of wholesalers and internal distributors. *See* 187 Wash. at 476. In *Air-Mac*, the court simply held that a particular business activity constituted a taxable distribution under Wash. Rev. Code § 82.04.270(2). The *Air-Mac* opinion does not even remotely suggest that differing tax treatment of wholesalers and internal distributors might be unconstitutional.

[10]In this regard, it is significant that the Washington Supreme Court majority cited not one decision of this Court in support of its equal protection holding. Furthermore, in that portion of its opinion, the majority cited no previous Washington decision in which the court had held any other statute unconstitutional. *See* 114 Wash. 2d at 187-88, 787 P.2d at 25 (Pet. 5a-6a).

fining Co., 287 U.S. 358, 364 (1932), this is not a substantial federal question. *See Palmer Oil Corp. v. Amerada Corp.*, 343 U.S. 390 (1952). Moreover, even if this due process question were substantial, it was neither properly raised nor decided in the state court, as explained above.

Therefore, the Court probably lacks jurisdiction to review the Washington Supreme Court's judgment.

III. THE PORTION OF THE WASHINGTON SUPREME COURT'S JUDGMENT THAT DENIED ASSOCIATED GROCERS ANY FORM OF RETROSPECTIVE RELIEF SHOULD BE DEEMED CORRECT BECAUSE THE WASHINGTON COURT ERRONEOUSLY HELD THAT THE PARTIAL TAX EXEMPTION IN QUESTION VIOLATES THE EQUAL PROTECTION CLAUSE.

The Washington Supreme Court majority unnecessarily addressed remedial and prospective application issues in its opinion because the court erroneously declared invalid the partial exemption in Wash. Rev. Code § 82.04.270(2) -- even though the court did so prospectively only. As the three dissenting justices below recognized, the partial exemption is rationally related to a legitimate state purpose and, therefore, is constitutional. The Washington court's refusal to provide retrospective relief to Associated Grocers was appropriate because the exemption was and is constitutional.

The Washington court's refusal to provide retrospective relief may be defended on any ground properly raised below, whether or not that ground was rejected. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977). Because the logic of defending the judgment below on the basis that the exemption is constitutional "would not dictate affirmance" of the judgment, however, the State filed a cross-petition in this matter (No. 90-465). *See National Labor Relations Board v. International Van Lines*, 409 U.S. 48, 52 n.4 (1972).

The reasons for the State's contention that the court below erroneously declared the exemption in violation of the

Equal Protection Clause are presented at length in the State's cross-petition, the State's reply memorandum, and the dissenting opinion below, *Associated Grocers*, 114 Wash. 2d at 191-97, 787 P.2d 27-30 (Pet. 10a-17a). To repeat them here would unnecessarily lengthen this brief in opposition.

CONCLUSION

For the reasons stated in this brief, Associated Grocers' petition probably should be denied for lack of jurisdiction. If the Court grants Associated Grocers' petition, however, the Court should also grant the State's cross-petition. Because the Washington Supreme Court's underlying equal protection holding so clearly deviates from accepted equal protection jurisprudence, the Court may wish to consider summary disposition of the matter, including remand to the Washington Supreme Court for reconsideration of the equal protection issue.

DATED this 4th day of December, 1990.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE STATE OF WASHINGTON

No. 55686-5

STATE OF WASHINGTON,

Appellant,

vs.

ASSOCIATED GROCERS, INC.,

Respondent.

RESPONDENT ASSOCIATED GROCERS' MOTION FOR CLARIFICATION AND RECONSIDERATION

I. IDENTITY OF MOVING PARTY

Respondent Associated Grocers, Inc. ("Associated Grocers") asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Associated Grocers seeks reconsideration of one aspect of this Court's March 1, 1990 decision, and clarification as to another. Clarification is requested to assure that Associated Grocers will be treated the same as distributors, where both relied on the validity of the exemption after it was extended to Associated Grocers by the Partial Summary Judgment entered by the trial court in this matter on March 29, 1988 (CP 29). A copy of the order is attached for the Court's convenience as Appendix A (herein the "March 29, 1988 Order").

Associated Grocers also seeks reconsideration of this Court's initial decision to reverse the trial court award of a statutory refund to Associated Grocers. The denial of that refund is itself a denial of equal protection to Associated Grocers for prior years and cannot be squared with the goal of fashioning equitable relief that is a blend of what is nec-

essary, fair and workable. *Bond v. Burrows*, 103 Wn.2d 153, 164, 690 P.2d 1168 (1984), cited in *State v. Associated Grocers, Inc.*, No. 55686-5, slip op. at 10 (March 1, 1990).

Associated Grocers does not seek reconsideration of this Court's holding that RCW 82.040.270 [sic] describes a single class of taxpayers that must be treated alike as a matter of constitutional law. *Associated Grocers*, slip. op. at 7. Nor does Associated Grocers seek reconsideration of the Court's decision to sever the unconstitutional exemption from RCW 82.04.270 prospectively for all members of the one taxpayer class designated in the statute. Instead, Associated Grocers seeks relief that encompasses two earlier time frames. For convenience, "interim period," refers to the period from March 29, 1988 to April 1, 1990.

By its March 29, 1988 order, the trial court ordered the exemption contained in RCW 82.04.270 extended to Associated Grocers on the same basis that it was then available to all other members of the one taxpayer class covered by that statute. This Court instead severed the exemption for all members of the taxpayer class as of April 1, 1990, but did so prospectively to avoid an assessment of back taxes on distributors who relied on the exemption in prior years. *Associated Grocers*, slip op. at 10.

First, Associated Grocers requests confirmation from the Court that it will be treated the same as distributors, and cannot be assessed additional tax for the interim period. [1]

Second, we address the time period prior to the trial court's decision of March 29, 1988, including the statutory refund period defined in RCW 82.32.060. Associated Grocers requests that the court reconsider its denial of monetary relief to Associated Grocers for the unconstitutionally unequal portion of the tax paid by Associated Grocers during the statutory refund period.

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[1]Associated Grocers believes that a fair reading of this Court's decision precludes an assessment of back taxes against Associated Grocers for the interim period, and its present request for clarification should not be construed as a suggestion to the contrary. It is made in an abundance of caution, only.

III. FACTS RELEVANT TO MOTION

The trial court, as affirmed by this Court, held that the legislature created one class of taxpayers under RCW 82.04.270, and that a partial exemption for some members of that class and not all violated the equal protection clause of the fourteenth amendment of the United States Constitution and the privileges and immunities clause of the Washington Constitution. To cure that unconstitutional inequality, the trial court extended the exemption to Associated Grocers by its March 29, 1988 order. To remedy the past denial of equal protection to Associated Grocers, the trial court also granted Associated Grocers a refund of the $9,938,529 in taxes collected in violation of Associated Grocers' equal protection rights. The refund amount included *only* the unequal and greater portion of the tax paid by Associated Grocers due to the unconstitutional denial of the exemption. It did not include the equal and therefore constitutional portion of the tax paid by Associated Grocers (and distributors) during the refund period.

The State appealed. This Court granted direct review and affirmed the trial court's ruling that by excluding Associated Grocers from the benefit of the exemption, RCW 82.04.270 violated the equal protection rights of Associated Grocers. Rather than extend the exemption to Associated Grocers, however, this Court chose to sever the exemption from RCW 82.04.270 as of April 1, 1990, providing a solely prospective remedy.[2] *See Associated Grocers*, slip. op. at 9.

By extending the exemption to Associated Grocers, the trial court specifically held that Associated Grocers was no longer required to pay the business and occupation tax to the extent the exemption applied to Associated Grocers after March 29, 1988. Associated Grocers relied on the March 29, 1988 order, and like internal distributors, did not pay

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[2]The parties briefed and argued whether the Court should sever the exemption or extend it to Associated Grocers. The parties did not brief and argue the separate issue of whether Associated Grocers should, in equity and as a matter of constitutional law, receive a refund if the exemption were severed rather than extended. Associated Grocers has always requested a refund; the State has never requested a solely prospective remedy.

that portion of the business and occupation tax from which it was exempt. Associated Grocers is thus entitled to an express holding that it shall not be subject to "back taxes" attributable to its reliance on the exemption after the March 29, 1988 order.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. THE COURT SHOULD GRANT RETROSPECTIVE AS WELL AS PROSPECTIVE RELIEF.

The constitutional underpinning of this Court's March 1, 1990 decision, and that of the trial court below, is that RCW 82.04.270 creates one class of taxpayers, and that equal protection of the laws requires that all members of that one class be treated alike. Thus this Court's holding that:

> The exemption in RCW 82.04.270(2) is applied only to distributors, and not to wholesalers. The members of the class are thus treated differently. The first inquiry under the *Yakima County* test, then, is answered 'no.' The exemption, which applies only to distributors, violates Associated's rights under the equal protection clause of the 14th Amendment to the United States Constitution and the privileges and immunities clause of the state constitution (Const. Article I, § 12). Where, as here, there is but one class, and the members of it are taxed differently, the statute must be declared unconstitutional.

Associated Grocers, slip op. at 6. That holding immediately followed this Court's succinct observation that:

> This Court has consistently treated distributors and wholesalers as members of a single class under the statute [RCW 82.04.270] and its forerunners. *See, e.g., Benjamin Franklin Thrift Stores Inc. v. Henneford*, 187 Wash. 472, 60 P.2d 86 (1936); *Air-Mac, Inc. v. State*, 78 Wn.2d 319, 474 P.2d 261 (1970).

Id.

To assure "a tax equal" prospectively on all members of the one class of taxpayers covered by RCW 82.04.270, the trial court extended the subject exemption to Associated Grocers on the same basis that it was already available to

internal distributors. This Court instead chose to ensure equal treatment of all members of the class by severing the exemption from the statute prospectively from April 1, 1990. In doing so, this Court expressly noted that:

> Arguably distributors, who have benefitted for 30 years from an invalid exemption, should now be assessed for taxes they should have paid. However, all parties presumed the validity of RCW 82.04.270(2), and great financial and administrative hardship would result from retroactive application of our decision in this case. We therefore apply our holding prospectively only. *See Bond v. Burrows*, 103 Wn.2d 153, 690 P.2d 1168 (1984).

Id.

The Court's reference to the *Bond* decision is of particular significance with respect to the "interim period" here, for as this Court observed in *Bond*, 103 Wn.2d at 164, 690 P.2d 1168, it is important to recognize:

> That we are acting within the framework of appropriate *equitable relief* with respect to an unconstitutional taxation statute * * * [and] In fashioning an equitable remedy, reliance interest weighs heavily, *and the court should seek a blend of what is necessary, fair and equitable*. (Emphasis added).

By prospective severance of the exemption, the Court has insured that for the future, all members of the one class of taxpayers covered by RCW 82.04.270 will be taxed alike. That remedy clearly implements the purpose of RCW 82.98.030 (the severance clause in RCW Title 82), and insures equal protection of the laws for all taxpayers covered by the statute on and after April 1, 1990. To thus focus entirely on the future, however, is to ignore this Court's own charge to act within the framework of appropriate equitable relief under the *Bond* decision.

Prospective severance alone is clearly an incomplete and therefore inappropriate remedy in this case. It fails to specifically foreclose the possibility of the assessment of an unconstitutionally unequal tax on Associated Grocers for the interim period. Prospective severance alone also serves to perpetuate the denial of equal protection suffered by As-

sociated Grocers prior to the trial court's March 29, 1988 order, including the statutory refund period covered by RCW 82.32.060. Indeed, the denial of a refund to Associated Grocers is itself a denial of equal protection of the laws to Associated Grocers, and in effect a judicial repeal of the refund statute RCW 82.32.060. Moreover, such a denial of retrospective monetary relief to Associated Grocers is both unnecessary and unfair. *Bond*, 103 Wn.2d 153, 690 P.2d 1168.

It is not necessary for the Court to choose between prospective severance and a retrospective refund to Associated Grocers, as if the two concepts were mutually exclusive. They are not, and in fact the correct remedy here is to apply both concepts in an equitable combination. Prospective severance of the exemption insures future equal taxation on all members of the one class of taxpayers under RCW 82.04.270. Equitable relief in the form of a retrospective refund to Associated Grocers for the statutory period is "necessary, fair and workable" given the fact that Associated Grocers paid an unconstitutionally unequal and greater tax than other members of the class during prior years. Prospective severance of the exemption, combined with relief during the interim period and a retrospective statutory refund to Associated Grocers, assures equal protection of the law both past and future.

B. ASSOCIATED GROCERS IS ENTITLED TO EQUAL TREATMENT DURING THE INTERIM PERIOD.

1. THE SUPREME COURT SHOULD CLARIFY ITS HOLDING BY AFFIRMING THE TRIAL COURT'S REMEDY THROUGH THE EFFECTIVE DATE OF THE SUPREME COURT'S HOLDING.

Both Associated Grocers and distributors relied upon the validity of the exemption after the trial court's March 29, 1988 order. It would be patently inequitable to leave Associated Grocers, but not distributors, exposed to an additional tax from that date to the present time. Doing so would amount to retrospective severance of the exemption as to *only* Associated Grocers. Indeed, it would be a denial of equal protection to permit the State to collect additional

tax from Associated Grocers for the interim period, but bar the State from collecting the same tax from other members of the class who also relied on the exemption.

It is equally worthwhile to note that Associated Grocers is clearly entitled to retrospective relief during the interim period under the three-part test adopted by this Court in *National Can v. Dep't of Revenue*, 109 Wn.2d 878, 724 P.2d 1286 (1988)[3] and applied by this Court in *Bond*, 103 Wn.2d 153, 690 P.2d 1168. The first question to be answered under that test is whether this Court's holding -- that RCW 82.04.270 establishes one class of taxpayers that must be treated alike -- "establishes a new principle of law, either by over-ruling past precedent upon which the litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed?" *National Can*, 109 Wn.2d at 882, 749 P.2d 1286. The answer here is clearly "no." This Court has consistently treated distributors and wholesalers as members of a single class under RCW 82.04.270 and its forerunners. *Associated Grocers*, slip op. at 6. That holding, which dates back more than 50 years to the 1936 holding of this Court in *Benjamin Franklin Thrift Stores, Inc. v. State*, 187 Wash. 472, 60 P.2d 86 (1936), is hardly "a new principle of law."

The second question to be answered under the *National Can* test is whether retrospective relief for Associated Grocers during the interim period would "further or retard" the legislative purpose of "a tax equal" under RCW 82.04.270, and equal protection of the laws. *National Can*, 109 Wn.2d at 888, 749 P.2d 1286. The answer here is clearly

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[3]Although tax refunds were denied in *National Can*, Associated Grocers brought that decision to the attention of the State and the trial court well before the trial court entered its March 29, 1988 Order extending the exemption to Associated Grocers. In at least tacit recognition of what we now show, the state has never urged that the rationale of *National Can* would justify denial of interim relief or a refund to Associated Grocers. In *National Can*, 109 Wn.2d 878, 749 P.2d 1286, the Court correctly granted the Department's request for prospective effect. However, the longstanding rule of retrospective effect of this Court's judgments should apply here. The internal consistency test developed by the United States Supreme Court in the *National Can* case. [sic] The test is whether a statute places an undue burden on interstate com-

"yes." To relieve distributors of liability for "back taxes" from the date of the trial court decision extending the exemption to Associated Grocers, but to deny the same relief to Associated Grocers during the same period, would be a manifest injustice. It would also be in direct conflict with the equal protection grounds on which this Court based its decision to sever the exemption for all members of the class from and after April 1, 1990.

The third question to be asked, with respect to the interim period and under the *National Can* test, is whether any inequities would be imposed by retrospective application of this Court's ruling that all members of the one taxpayer class under the statute must be treated alike. *Id.* at 890, 749 P.2d 1286. The obvious answer is "no." Again, it would be patently inequitable to relieve distributors of back taxes because they relied upon the exemption during the interim period, but to fail to do the same for Associated Grocers, who likewise relied upon the validity of the exemption as extended to it by the trial court in its March 29, 1988 order.[4]

This Court should, for the reasons just enumerated, expressly modify its March 1, 1990 decision to direct that the

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merce "on its face." The test hypothetically assumes that all states have enacted the statute being tested. *National Can*, 109 Wn.2d 878, 749 P.2d 1286. Although only a few jurisdictions assess B & O taxes and thus only a few taxpayers paid both in Washington and elsewhere, the *National Can* litigants nonetheless requested refunds in excess of $56,000,000 for their largely hypothetical injury. *Id.* at 893, 749 P.2d 1286. The unequal and greater tax paid by Associated Grocers by reason of the unconstitutional denial of the exemption to it is not hypothetical. As the *National Can* Court recognized, retroactive treatment there would have relieved some taxpayers of their fair share of the tax burden. *Id.* at 889-890, 749 P.2d 1286. That is not so here, where Associated Grocers has paid and does not seek a refund of its fair share of the equal and therefore constitutional portion of the tax imposed by RCW 82.04.270. Associated Grocers only seeks a refund of the unequal, greater, and unconstitutional portion of the tax paid by Associated Grocers and not paid by other members of the same class.

[4]Potential hardship to the State must also be considered. *National Can*, 109 Wn.2d 878, 749 P.2d 1286. Equal treatment of Associated Grocers and distributors during the interim period, however, imposes no hardship whatsoever on the State. The State has neither received nor relied upon the additional taxes which Associated Grocers would have paid during the interim period absent the March 29, 1988 order.

State may not assess or collect from Associated Grocers taxes withheld by Associated Grocers under the exemption in reliance upon the trial court's March 29, 1988 order. As we next show, the refund ordered by the trial court should be reinstated for similar reasons of fairness and equity.

C. ASSOCIATED GROCERS IS ENTITLED TO A STATUTORY REFUND OF TAXES COLLECTED BEFORE THE TRIAL COURT'S DECISION.

The Court states, in denying a refund to Associated Grocers, that:

> Tax refunds are not mandated when a statutory scheme is found to be unconstitutional except when taxes were collected in violation of the Constitution. *See National Can Corp. v. Department of Revenue*, 109 Wn.2d 878, 749 P.2d 1286, *appeal dismissed, cert. denied*, ___ U.S. ___, 100 L.Ed.2d 615, 108 S. Ct. 2030 (1988). Associated does not argue that the tax levied under RCW 82.04.270(1), which it paid and for which it seeks a partial refund, is unconstitutional.

Associated Grocers, slip op. at 9.

Whereas the reference to the *National Can* decision is proper, the Court has misunderstood the contention of Associated Grocers. Because of the denial of equal protection found by this Court, Associated Grocers paid an unequal and greater tax than distributors paid under the statute. To the extent of that greater tax, Associated Grocers paid "an unconstitutional tax." The refund awarded by the trial court covered only the unequal and greater portion of the exaction, and did not include the equal and therefore, lawful portion of the tax paid by both Associated Grocers and distributors under RCW 82.04.270. The refund, in short, covered only taxes collected from Associated Grocers "in violation of the Constitution." As a result, the refund was properly awarded to Associated Grocers under the *National Can* analysis.

Whereas a tax refund is "not *always* mandated," a tax refund is necessary where appropriate under the three part *National Can* test. *National Can*, 109 Wn.2d at 881, 749 P.2d 1286 (emphasis added). Indeed, applying the *National*

Can test to this Court's decision -- that the unequal tax is unconstitutional -- it is clear that this decision should operate retrospectively to provide a refund of the unconstitutional portion of the tax to Associated Grocers. Application of the Court's decision in that fashion would be based upon no "new principle of law." *Associated Grocers*, slip op. at 6. An equitable remedy is required. *Bond*, 103 Wn.2d 153, 690 P.2d 1168. Moreover, a refund will clearly promote rather than retard equal protection of the laws, which is the core element of this Court's decision. The first and second tests adopted in *National Can* are thus satisfied with respect to the grant of a refund to Associated Grocers.

The third element of the *National Can* test is also satisfied, because no party will be subject to inequality by the award of a statutory refund to Associated Grocers. *National Can*, 109 Wn.2d at 890, 749 P.2d 1286. Distributors will be totally unaffected, and Associated Grocers will at least be made partially whole for the unconstitutionally unequal and greater tax it paid during the statutory refund period. The State is permitted to keep the unconstitutionally greater portion of the unequal tax collected from Associated Grocers for more than 20 years prior to the statutory refund period, and the State gains substantial new revenues from distributors as a result of the prospective severance of the exemption. It would, we submit, be difficult to conceive of a more equitable "blend of what is necessary, fair and workable" for all concerned. Unfairness arises only if Associated Grocers is denied relief for the interim period, and denied a refund for the statutory period.

D. FEDERAL LAW MANDATES THE REQUESTED RELIEF.

Finally, to deny Associated Grocers relief during the interim period and the refund ordered by the trial court would be to deny Associated Grocers equal protection under federal constitutional law. As stated in *Carpenter v. Shaw*, 280 U.S. 363 (1930), a state court's failure to refund the taxes unlawfully collected violates fourteenth amendment rights to equal protection of the law:

A denial by a state court of a recovery of taxes exacted

> in violation of the laws or constitution of the United States by compulsion is itself in contravention of the 14th Amendment.

Id. at 369. *See also, Maryland v. Louisiana*, 452 U.S. 456, 457 (1981) (ordering State whose tax statute violated the commerce clause and supremacy clause to provide a tax refund); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 447 (1922).

Thus, also, the holding in *Montana Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 449, 504-5 (1928), where the Court stated:

> [The taxpayer] cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury.

An equal protection tax case squarely on point is *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931), where the Court stated that:

> The petitioner's rights were violated, and the cause of action arose, when taxes at lower rates were collected from their competitors.

The Iowa-Des Moines Bank decision remains vital law today. The United States Supreme Court continues to rely on the straightforward analysis and conclusion of that decision, and cited it with approval in *Davis v. Michigan Dep't of Treasury*, ___ U.S. ___, 109 S. Ct. 1500 (1989), and *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, ___ U.S. ___, 109 S. Ct. 633 (1989).

V. CONCLUSION

This Court has properly found that the exemption contained in RCW 82.04.270 is, as written, an unconstitutional denial of equal protection of the laws to some members of the one class of taxpayers described in that statute. Prospective severance of the exemption properly cures that constitutional defect, but only for the future. Absent retrospective relief, the monetary injury suffered by Associated Grocers from the past denial of equal protection goes

unabated. The more complete and therefore correct remedy here must include express relief for Associated Grocers during the interim period since the trial court's extension of the exemption to Associated Grocers on March 29, 1988, and reinstatement of the trial court's statutory refund. Prospective severance of the exemption implements the severance clause of RCW title 82, assures equal treatment of all members of the class prospectively, and provides the State with additional revenues. Interim relief assures equal treatment of Associated Grocers and distributors since March 29, 1988, and imposes no hardship on the state or those distributors. Award of a statutory refund to Associated Grocers implements RCW 82.32.060, furthers the purpose of equal protection and the legislative intent of "a tax equal," and abates the past discriminatory treatment of Associated Grocers. Distributors are wholly unaffected by the refund, and any resulting hardship to the state is more than offset by future tax revenues the state will receive as the result of prospective severance of the exemption of all taxpayers covered by RCW 82.04.270. The goal of fashioning equitable relief that is necessary, fair and workable under the standard laid down by this court in *Bond*, 103 Wn.2d 153, 690 P.2d 1168, is thus attained by a meaningful combination of prospective severance, interim relief, and a statutory refund to Associated Grocers. This Court should modify its March 1, 1990 decision accordingly.

DATED this 21st day of March, 1990.

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